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Sang Lee Co Sdn Bhd & Ors v Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm)

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-16 OF 2009(W)
ZULKEFLI, JAMES FOONG AND HELILIAH FCJJ
29 APRIL 2010

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Civil Procedure — Functus officio — Principles of — Judgment and orders — Whether true intention of court reflected in perfected order — Whether order drawn up and perfected could be amended to reflect what was actually pronounced — Rules of the High Court 1980 O 20 r 11

D

Civil Procedure — Judgments and orders — Amendment of — Whether true intention of court reflected in perfected order — Whether sealed order could be amended to reflect what was actually pronounced — Rules of the High Court 1980 O 20 r 11

E

Civil Procedure — Judgments and orders — Preparation of judgments or order — Failure to comply with procedure in O 42 r 8 of the Rules of the High Court — Terms of plaintiff's draft order objected by defendant's solicitors — Order perfected despite defendant's solicitor's objection — Whether true intention of court reflected in perfected order — Whether judge correct in allowing application to correct errors in perfected order

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The respondent/plaintiff had filed an inter partes application for an interlocutory injunction against the appellants/defendants ('encl 3'). On the first hearing date of encl 3 on 27 June 2006 the matter came before the learned judicial commissioner Noor Azian bt Shaari ('JC1'). However, upon the plaintiff's counsel's request for an adjournment to reply to the defendants' affidavits, the court postponed encl 3 for hearing on 26 July 2006. Meanwhile, pursuant to the plaintiff's counsel's oral application, the court granted an ad interim injunction pending the disposal of encl 3 to preserve the status quo. The plaintiff prepared the draft order ('the draft order') as if the court had already made a decision on encl 3 (which was adjourned) instead of an ad interim order to maintain status quo only. Upon receipt of the draft order, the defendants' counsel immediately informed the plaintiff's counsel, the deputy registrar and the judge's secretary of the dispute as to the terms of the draft order and sought an appointment with the deputy registrar or judge pursuant to O 42 r 8 of the Rules of the High Court 1980 ('RHC') to sort out the terms of the draft order. However there was no response from

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the plaintiff's counsel or from the court. Subsequently, the plaintiff's counsel served the defendants' counsel a perfected sealed ad interim order dated 27 June 2006 ('the sealed order') which bore no semblance with the actual ad interim order pronounced by JC1. The defendants thereafter applied to amend the terms of the sealed order ('encl 45'). Enclosure 45 was heard by learned judicial commissioner Tengku Maimun bt Tuan Mat ('JC2') who allowed the application so that the corrected order truly reflected what was actually pronounced by JC1. Upon the plaintiff's appeal, the Court of Appeal allowed the appeal and reversed the decision of JC2. The defendants obtained leave to appeal on the following question: 'Whether the High Court has power to grant an order extending the terms of an earlier order without following the procedures prescribed by O 42 r 8 of the RHC'.

Held, allowing the appeal with costs here and below:

(1) The Court of Appeal erred, in law and in fact, in failing to consider that O 42 r 8 of the RHC was never complied with, which had resulted in the error on the face of the record. The draft ad interim order prepared by the plaintiff's solicitors was never approved by the defendants' solicitors. The defendants' solicitors had informed the plaintiff's solicitors of their objection to the draft order and had sought an appointment under O 42 r 8 to sort out the terms of the ad interim order (see para 3).

(2) The Court of Appeal failed to consider that there was nothing in the court records to indicate that the deputy registrar had ever referred the matter to the High Court judge before perfecting the order. Hence it was wrong for the Court of Appeal to assume that the sealed order was accurate and that it emanated from the High Court. This was contrary to the finding of fact made by the High Court wherein JC2 had allowed encl 45 so that the corrected order truly reflected what was actually pronounced by JC1 (see para 6).

(3) Enclosure 45 was not intended to alter, vary or set aside a perfected order but to correct the errors in the said order drawn up by the plaintiff's solicitors which had failed to express the true intention of the court in granting an interim injunction until the disposal of encl 3. The learned JC2 was right in allowing encl 45 (see para 7).

(4) In the light of a clear difference and discrepancy between the terms of the sealed order as compared with the actual order pronounced by the learned JC1 on 27 June 2006, it was only right and proper that the sealed order be amended accordingly pursuant to O 20 r 11 of the RHC. The court can amend an order which does not reflect what was actually pronounced. In such a situation the court is not functus officio (see paras 8–9).

A (5) The learned JC2 who amended the sealed order on 23 May 2007 had acted within the powers generally exercised by a judge of the High Court notwithstanding that she was not the trial judge who granted the ad interim order dated 27 June 2006. JC2 had acted properly to put the court's records right (see para 10).

B (6) The deputy registrar had no power to grant an order extending the terms of an earlier order pronounced by JC1 without following the procedure prescribed by O 42 r 8 of the RHC (see para 11).

C **[Bahasa Malaysia summary**

Responden/plaintif telah memfailkan permohonan inter partes bagi satu injunksi interlokutori terhadap perayu-perayu/defendan-defendan ('lampiran 3'). Pada pendengaran pertama lampiran 3 pada 27 Jun 2006 perkara tersebut disebut di hadapan pesuruhjaya kehakiman yang bijaksana Noor D Azian bt Shaari ('PK1'). Walau bagaimanapun, atas permintaan peguam plaintif untuk penangguhan bagi membalas afidavit defendan-defendan, mahkamah menangguhkan lampiran 3 untuk pendengaran pada 27 Julai 2006. Sementara itu, berikutan permohonan lisan peguam plaintif, E mahkamah memberikan injunksi ad interim sementara menunggu kemuktamadan lampiran 3 untuk mengekalkan status quo. Plaintif menyediakan draf perintah ('draf perintah') seolah-olah mahkamah telahpun membuat keputusan atas lampiran 3 (yang mana ditangguhkan) dan bukannya perintah ad interim untuk mengekalkan status quo sahaja. F Berikutan penerimaan draf perintah, peguam defendan serta-merta memaklumkan peguam plaintif, penolong pendaftar dan setiausaha hakim tentang pertikaian terma-terma draf perintah dan memohon perjumpaan dengan penolong pendaftar atau hakim berikutan A 42 k 8 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMT') untuk menyelesaikan terma-terma draf G perintah tersebut. Tetapi, tiada jawapan daripada peguam plaintif atau mahkamah. Seterusnya peguam plaintif menyampaikan kepada peguam defendan perintah ad interim termeterai bertarikh 27 Jun 2006 ('perintah termeterai') yang langsung tidak sama dengan perintah ad interim sebenar yang dibaca oleh PK1. Defendan-defendan kemudiannya memohon untuk H meminda terma-terma perintah termeterai ('lampiran 45'). Lampiran 45 didengar oleh pesuruhjaya kehakiman yang bijaksana Tengku Maimun bt Tuan Mat ('PK2') yang membenarkan permohonan tersebut agar perintah yang diperbetulkan itu mencerminkan apa yang dibaca oleh PK1 sebenarnya. Dalam rayuan plaintif, Mahkamah Rayuan membenarkan rayuan tersebut I dan mengakaskan keputusan PK2. Defendan-defendan mendapat kebenaran untuk merayu atas persoalan berikut: 'Sama ada Mahkamah Tinggi mempunyai kuasa untuk memberikan suatu perintah yang memperluaskan terma-terma perintah sebelumnya tanpa mematuhi prosedur yang diperuntukkan oleh A 42 k 8 KMT'.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Rayuan:

(1) Mahkamah Rayuan telah khilaf, dari segi undang-undang dan fakta, apabila gagal mempertimbangkan bahawa A 42 k 8 KMT tidak pernah dipatuhi, yang mengakibatkan kesilapan dalam rekod. Draf perintah ad interim yang disediakan oleh peguam plaintif tidak pernah dipersetujui oleh peguam defendan. Peguam defendan telah memaklumkan peguam plaintif bantahan mereka terhadap draf perintah tersebut dan telah memohon pertemuan di bawah A 42 k 8 untuk menyelesaikan terma-terma perintah ad interim tersebut (lihat perenggan 3).

(2) Mahkamah Rayuan gagal mempertimbangkan bahawa tiada apa-apa dalam rekod mahkamah menunjukkan bahawa timbalan pendaftar pernah merujuk perkara tersebut kepada hakim Mahkamah Tinggi sebelum menyempurnakan perintah tersebut. Oleh itu, adalah silap bagi Mahkamah Rayuan untuk menganggap bahawa perintah termeterai tersebut adalah tepat dan datangnya daripada Mahkamah Tinggi. Ini adalah bertentangan dengan penemuan fakta yang dibuat oleh Mahkamah Tinggi di mana PK2 membenarkan lampiran 45 agar perintah yang diperbetulkan itu mencerminkan apa yang dibaca PK1 sebenarnya (lihat perenggan 6).

(3) Lampiran 45 bukanlah bertujuan untuk meminda, mengubah atau mengetepikan perintah yang telah sempurna tetapi untuk membetulkan kesilapan dalam perintah yang dibuat oleh peguam plaintif yang mana gagal menyatakan niat sebenar mahkamah dalam membenarkan injunksi interim sehingga kemuktamadan lampiran 3. PK2 yang bijaksana adalah betul dalam membenarkan lampiran 45 (lihat perenggan 7).

(4) Dalam perbezaan dan percanggahan yang nyata antara terma-terma perintah termeterai berbanding dengan perintah sebenar yang dibaca oleh PK1 yang bijaksana pada 27 Jun 2006, adalah tepat dan sesuai perintah termeterai tersebut dipinda sewajarnya berikutan A 20 k 11 KMT. Mahkamah boleh meminda perintah yang tidak mencerminkan apa yang dibaca sebenarnya. Dalam keadaan sebegitu, mahkamah tidak functus officio (lihat perenggan 8–9).

(5) PK2 yang bijaksana yang meminda perintah termeterai pada 23 Mei 2007 telah bertindak dalam kuasanya yang pada amnya diamalkan oleh hakim Mahkamah Tinggi walaupun beliau bukan hakim bicara yang memberikan perintah ad interim bertarikh 27 Jun 2006. PK2 telah bertindak sewajarnya bagi membetulkan rekod mahkamah (lihat perenggan 10).

(6) Timbalan pendaftar tiada kuasa untuk memberikan suatu perintah yang memperluaskan terma-terma perintah terdahulu yang dibaca oleh PK1 tanpa mematuhi prosedur yang diperuntukkan dalam A 42 k 8 KMT (lihat perenggan 11).]

Notes

For a case on principle of functus officio, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on amendment of judgments and orders, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4020–4026.

For cases on judgments and orders generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4017–4288.

Cases referred to

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

R v Cripps ex parte Muldoon and others [1984] 2 All ER 705, CA (refd)

Legislation referred to

Rules of the High Court O 20 r 11, O 42 r 8

Appeal from: Civil Appeal No W-02–504 of 2007 (Court of Appeal, Putrajaya)

Chan Vy Sing (Lam Cheng Wun with him) (Lee & May) for the appellants.
Vinod Kamalanathan (Vinod Kamalanathan & Associates) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal which allowed the respondent's appeal against the decision of the High Court at Kuala Lumpur dated 23 May 2007. Before the High Court, the appellants were the defendants and the respondent was the plaintiff. We shall refer to the parties as they were before the High Court. We heard this appeal on 22 February 2010 wherein we had allowed this appeal by the defendants. We now give our reasons in arriving at our decision.

BACKGROUND FACTS

[2] The relevant background facts leading to the present appeal by the defendants may be summarised as follows:

(a) On 11 May 2006 the plaintiff filed a writ of summons and statement of claim against the defendants for alleged breach of contract.

(b) The defendants filed a statement of defence and a counterclaim dated 12 June 2006 against the plaintiff alleging, inter alia, that the documents and purported contract relied on by the plaintiff were forged documents and that the plaintiff has also trespassed on the land owned by the first defendant.

(c) The plaintiff then filed an inter partes application dated 11 May 2006 for an interlocutory injunction against the defendants for an order that the defendants, be restrained from taking any steps in any form or manner whatsoever whether in their own capacity or officers and/or agents from entering into any contract and/or allowing any person other than the plaintiff to cut and/or tap and/or dispose of all trees on the land belonging to the first defendant ('encl 3').

(d) Enclosure 3 was scheduled to be heard on 27 June 2006. In the meantime, there were exchanges of affidavits between both parties.

(e) On the first hearing date of encl 3 on 27 June 2006 the matter came before the learned judicial commissioner Noor Azian bt Shaari ('JC1') of the Kuala Lumpur High Court Civil Division No 7 ('High Court Civil 7'). The defendants' counsel informed the court that they were ready to proceed. However, the plaintiff's counsel informed the court that they still wanted to reply further to the defendants' affidavits and applied for adjournment. The court then granted the plaintiff time to reply and fixed encl 3 for hearing on 26 July 2006.

(f) After the court had granted the plaintiff's request for adjournment, the plaintiff orally requested for an ad interim injunction to preserve the status quo pending the hearing of encl 3. The plaintiff gave an undertaking as to damages. This oral application for ad interim injunction was objected to by the defendants.

(g) After hearing the parties, the court granted an ad interim injunction pending the disposal of encl 3 to preserve the status quo, on the following terms:

> Nothing to be done on the related land until encl 3 is disposed and subject to the undertaking as to damages.

(h) The plaintiff prepared the draft order as if the court had already made a decision on encl 3 (which was adjourned) instead of an ad interim order to maintain status quo only. The defendants contended that what the plaintiff had drafted was totally different from what was pronounced by the court on 27 June 2006.

(i) Upon receipt of the draft ad interim order, the defendants' counsel immediately informed the plaintiff's counsel on the same day of their objections and simultaneously wrote a letter to the deputy registrar with

a copy to the judge's secretary of the dispute as to the terms of the draft ad interim order dated 27 June 2006. In that same letter the defendants' counsel sought an appointment with the deputy registrar or with the judge pursuant to O 42 r 8 of the Rules of the High Court 1980 ('RHC 1980') to sort out the terms of the ad interim order dated 27 June 2006.

(j) Despite requests for free dates, the plaintiff's counsel did not supply any free date to the defendants for the purposes of the appointment pursuant to O 42 r 8 of the RHC 1980. There was also no response as to the status of the draft order and the appointment with the deputy registrar or the judge from the court.

(k) On 28 July 2006, the plaintiff's counsel served the defendants' counsel with a purported perfected sealed ad interim order dated 27 June 2006 ('the sealed order') which bears no semblance with the actual ad interim order pronounced by the High Court judge on 27 June 2006.

(l) The defendants thereafter applied to the High Court to amend the terms of the sealed order ('encl 45').

(m) Pending the hearing of application to amend the sealed order, the plaintiff's application for interim injunction proper in encl 3 was dismissed with costs on 7 September 2006. However, despite the dismissal of encl 3, the plaintiff continued with committal proceedings against the defendants based on the sealed order dated 27 June 2006.

(n) When the application to amend encl 45 came up for hearing, another learned judicial commissioner Tengku Maimun bt Tuan Mat ('JC2') had been appointed to preside in the High Court Civil 7. The then learned JC2 after going through the entire court records and considering the matter at length, on 23 May 2007 granted the defendants' application to amend the sealed order so that the corrected order truly reflects what was actually pronounced by the learned JC1 on 27 June 2006.

(o) The plaintiff appealed to the Court of Appeal against the decision of the High Court ('JC2') dated 23 May 2007 in allowing the amendment of the sealed order. The Court of Appeal on the 15 September 2008 allowed the plaintiff's appeal and reversed the decision of the High Court judge dated 23 May 2007. The Court of Appeal reinstated the sealed order which was perfected and sealed by the deputy registrar.

(p) The defendants obtained leave of the Federal Court to appeal against the decision of the Court of Appeal on 22 April 2009. The sole question to be addressed by this court is as follows:

> Whether the High Court has power to grant an order extending the terms of an earlier order without following the procedures prescribed by O 42 r 8 of the RHC 1980.

DECISION

[3] It is our considered view that the Court of Appeal erred, in law and in fact, in failing to consider that O 42 r 8 of the RHC 1980 was never complied with in the present case which had resulted in the error on the face of the record. The draft ad interim order prepared by the plaintiff's solicitors was never approved by the defendants' solicitors. In fact the defendants' solicitors upon receipt of the draft ad interim order had informed the plaintiff's solicitors of their objection and had sought an appointment with the deputy registrar or with the judge pursuant to O 42 r 8 of the RHC 1980 to sort out the terms of the ad interim order.

[4] Order 42 r 8 of the RHC 1980 provides as follows:

> (1) Where a party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.
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> (2) …
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> (3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.
>
> (4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.
>
> (5) …

[5] Under O 42 r 8 of the RHC 1980 it is clear that if there is a dispute on the matter, any party may seek an appointment with the registrar to settle the terms and if the matter is heard by the judge the dispute may be determined by the judge. This is to safeguard the sanctity and authenticity of the final perfected sealed order and the court records. It is also to ensure that it accurately captures the very essence and terms of the order pronounced by the High Court. This is exactly what the defendants had done in this case.

[6] It is to be noted that the Court of Appeal failed to consider that there was nothing in the court records to indicate that the deputy registrar had ever referred the matter to the High Court judge before perfecting the order. Hence it was wrong for the Court of Appeal to assume that the sealed order was accurate and that it emanated from the High Court. This is contrary to

A the finding of fact made by the High Court on the 23 May 2007 wherein the learned JC2 granted the defendants' application in encl 45 to amend the sealed order so that the corrected order truly reflects what was actually pronounced by the learned JC1 on 27 June 2006.

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[7] We are of the view that the application made by the defendants in encl 45 to amend the terms of the sealed order was not intended to alter, vary or set aside a perfected order but to correct the errors in the said order drawn up by the plaintiff's solicitors which had failed to express the true intention of the court in granting an interim injunction restraining any party to deal with C the subject land until the disposal of encl 3. It is to be noted that the court had not granted any order as per the application in encl 3 but the order that was drawn up by the plaintiff's solicitors was in the form of encl 3 which had not yet been heard and determined by the court. The learned JC2 had made a finding that the sealed order that was drawn up by the plaintiff was clearly D not in accord with the minutes in the court file and thus there occurred an error. Accordingly, it is our judgment that the learned JC2 was right in allowing the defendants' application in encl 45.

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[8] A related issue which is raised in this appeal is the question of whether the court is functus officio when it purports to rectify and amend the sealed order to reflect what was actually pronounced. We are of the view in the light of a clear difference and discrepancy between the terms of the sealed order as compared with the actual order pronounced by the learned JC1 on 27 June F 2006, it was only right and proper that the sealed order be amended accordingly pursuant to O 20 r 11 of the RHC 1980. O 20 r 11 of the RHC 1980 provides as follows:

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> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

[9] The application to amend was filed as in encl 45 and the learned JC2 H on 23 May 2007 after considering the entire matter and hearing both parties had correctly granted an order in terms of encl 45 to amend the terms of the sealed order. The Court of Appeal should not have set aside the order for amendment made by the High Court on 23 May 2007 as the purpose and intention for the amendment is merely to set the court records straight and I to ensure that the actual terms pronounced by the High Court on 27 June 2006 have been properly authenticated and recorded. In law, the court can always amend an order which does not reflect what was actually pronounced. In such a situation the court is therefore not functus officio (see the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143).

[10] We also find that the learned JC2 who amended the sealed order on 23 May 2007 had acted within the powers generally exercised by a judge of the High Court notwithstanding that she was not the trial judge who granted the ad interim order dated 27 June 2006. The learned JC2 had acted properly to put the court's records right. On this point we would like to refer to the case of *R v Cripps, ex parte Muldoon and others* [1984] 2 All ER 705 wherein the English Court of Appeal held as follows:

> The power to amend under the slip rule contained in RSC O 20 r 11 was not a power granted to the particular trial judge, but was one of the powers of the court generally, exercisable by a judge of the court, who may or may not have been the trial judge.

CONCLUSION

[11] It is our judgment that the deputy registrar in the present case has no power to grant an order extending the terms of an earlier order pronounced by the learned JC1 without following the procedure prescribed by O 42 r 8 of the RHC 1980. For the reasons above stated we would answer the question posed in this appeal in the negative. Accordingly we allowed this appeal with costs here and the court below.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum